



2021-020

**STATE OF ALABAMA
OFFICE OF THE ATTORNEY GENERAL**

STEVEN T. MARSHALL
ATTORNEY GENERAL

501 WASHINGTON AVENUE
P.O. BOX 300152
MONTGOMERY, AL 36130-0152
(334) 242-7300
WWW.AGO.ALABAMA.GOV

February 9, 2021

Honorable Scott Harris
State Health Officer
Alabama Department of Public Health
Post Office Box 303017
Montgomery, Alabama 36130

Public Health, Department of –
Public Buildings – Trespass –
Photographs

Reasonable and viewpoint neutral
restrictions may be placed on the
public's access to the Alabama
Department of Public Health's state
laboratory and county health
departments.

Dear Dr. Harris:

This opinion of the Attorney General is issued in response to your
request on behalf of the Alabama Department of Public Health ("ADPH").

QUESTIONS

1. May the ADPH restrict access to the
state laboratory only to persons who have a
business purpose?

2. May the ADPH restrict access to the
curtilage of the state laboratory to prevent
persons from peering into windows or from
attempting to gain access through employee
entrances?

3. May the ADPH implement a policy that prohibits taking photographs or video recording in the lobby of county health departments?

4. May the ADPH implement a policy providing that if a visitor causes a disturbance or annoys persons in a county health department lobby, then they must leave the premises?

FACTS AND ANALYSIS

Your request states that local county health departments provide various healthcare services such as family planning, cancer screening, immunizations, and sexual transmitted disease testing. People also enter county health departments to pick up vital records, obtain the services of the Woman, Infants and Children Program, and other health care programs. The waiting room for clinical services is in the lobby. The facilities ADPH uses to provide these services, whether owned by a municipality, county commission, or the state, are in the exclusive possession and control of the ADPH.

The county health departments are subject to the Health Insurance Portability and Accountability Act ("HIPAA") and the regulations promulgated by the Department of Health and Human Services. 42 U.S.C. 1320d, *et seq.* Those regulations require ADPH to "designate a privacy official who is responsible for the development and implementation of the policies and procedures of the entity." 45 C.F.R § 164.530(a)(1)(i). Moreover, ADPH must "have in place appropriate administrative, technical, and physical safeguards to protect the privacy of protected health information." 45 C.F.R § 164.530(c)(1). The protections must "reasonably safeguard protected health information from any intentional or unintentional use or disclosure that is in violation of the standards . . . [and] safeguard protected health information to limit incidental uses or disclosures made pursuant to an otherwise permitted or required use or disclosure." 45 C.F.R § 164.530(c)(2)(i-ii).

You additionally state that the ADPH operates a state laboratory that is designated as a biosafety level 3 ("BSL-3") laboratory by the Centers for Disease Control and Prevention, and that access to the BSL-3-designated laboratory is always restricted and controlled. Laboratorians are under medical surveillance and might receive immunizations against microbes with which they work. The state laboratory is also a member of

the Federal Select Agent Program. The Federal Select Agent Program oversees the possession, use and transfer of biological select agents and toxins, which have the potential to pose a severe threat to public, animal, or plant health. All individuals who work with these agents undergo a security risk assessment performed by the Federal Bureau of Investigation/Criminal Justice Information Service. The only people who regularly enter the laboratory are employees, federal auditors, and vendors.

On October 19, 2020, a person visited the state laboratory and refused to sign in or have his temperature taken to screen for Covid-19. The person claimed to be a “First Amendment auditor,” and, while recording, attempted to access areas beyond the laboratory’s lobby to “perform an audit.” As a result of this attempted intrusion, you question whether county public health departments can limit photographs or video recording in their lobbies and whether a person causing a disturbance may be removed. In addition, you question whether a state laboratory can limit its accessibility to only those people with a business purpose.

While there is no law authorizing a “First Amendment audit” of a state laboratory or county health department, “[t]he First Amendment protects the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest.” *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000). Like all First Amendment protections, this right is “subject to reasonable time, manner and place restrictions,” and the First Amendment does not automatically open property to the public just because it is owned by the government. *Id.*; *Bloedorn v. Grube*, 631 F.3d 1218, 1230 (11th Cir. 2011). The level of scrutiny that a court will apply to a government’s restriction on the public’s access (including photography and video recording) to a public property depends on the forum where the restrictions are applied.

The state laboratory and county health departments are nonpublic fora. *See, Perry Educ. Ass’n v. Perry Loc. Educators’ Ass’n*, 460 U.S. 37, 46 (1983) (defining a nonpublic forum as public property that is not open to the public for First Amendment activity in the same way as are streets or parks). Thus, any restriction on public access to these buildings need only be “viewpoint neutral and reasonable in light of the purpose served by the forum.” *Davenport v. Wash. Educ. Ass’n*, 551 U.S. 177, 189 (2007); *see also Cornelius v. NAACP Legal Def. & Fund, Inc.*, 473 U.S. 788, 799–800 (1985). “It is a long-settled principle that governmental actions are subject to a lower level of First Amendment scrutiny when ‘the

governmental function operating ... [is] not the power to regulate or license, as lawmaker, ... but, rather, as proprietor, to manage [its] internal operation[s]....” *U.S. v. Kokinda*, 497 U.S. 720, 725 (1990) (citing *Cafeteria & Rest. Workers v. McElroy*, 367 U.S. 886, 896 (1961)). In this context, neither the state laboratory nor the county health departments act in a lawmaking capacity.

Like any private landowner, the government may “preserve the property under its control for the use to which it is lawfully dedicated.” *Sentinel Commc’ns Co. v. Watts*, 936 F.2d 1189, 1201 (11th Cir. 1991). Further, like any place of employment, a government workplace exists to accomplish the business of the employer. *Cornelius*, 473 U.S. 788, 805. The government may, therefore, exercise its right to control access to its workplace to avoid interruptions to the performance of the duties of its employees. *Id.* at 805-06.

With it established that public access to the state laboratory and county health departments may be reasonably restricted, it is now necessary to determine which entity is empowered to create the restrictions. Unless otherwise provided by law, all property belonging to the state (except money or evidence of debt) is “under the control of the Governor.” Ala. Code § 36-13-30 (Westlaw 2020). “Control” means “[t]he direct or indirect power to direct the management and policies of a person or entity, whether through ownership of voting securities, by contract, or otherwise; the power or authority to manage, direct, or oversee.” *Control*, Black’s Law Dictionary (8th ed. 2004). In contrast, county health officers occupy offices provided by the county commission. Ala. Code § 22-3-5(11) (Westlaw 2021). This Office has, however, recognized that some county health department buildings may be owned by the state, a county commission, a municipality, or the ADPH. Opinions to Claude Earl Fox, M.D., M.P.H., State Health Officer, dated May 5, 1987, A.G. No. 87-00163; Claude Earl Fox, M.D., M.P.H., State Health Officer, dated July 23, 1986, A.G. No. 86-00316.

The Legislature has granted some government entities direct control over the security and protection of the public buildings where they are housed. For example, the Legislature authorizes the Supreme Court to “institute and maintain safety programs and precautions” for the security and protection of the judicial building and other sites where the Supreme Court meets. Ala. Code § 12-2-18 (Westlaw 2020); *see also*, Opinion to Honorable Dr. Asa N. Green, President, Livingston State University, dated January 28, 1977 (the university has exclusive authority over and jurisdiction of its buildings and therefore may restrict access to its

facilities based on the need to ensure that the university serves the purpose for which it is created).

The ADPH does not have a similar statute regarding its public buildings. Although never extensively discussed by the courts, there has been at least one passing mention that “the legal custodian of a public building would seem to have the inherent power to regulate the coming and going of visitors . . .” afterhours. *Cartwright v. State*, 310 So.2d 258, 259 (Ala. Crim. App. 1975) (discussing whether a burglary in the second-degree charge may apply to a public building). Additionally, this Office has determined that, in the context of a lease, “trespass is an offense against lawful possession of property at the time an offense is committed, not ownership.” Opinion to Honorable Russell B. Robertson, Attorney for City of Jasper, dated June 3, 2015, A.G. No. 2015-048 (citing, ALA. CODE § 13A-7-4 (2006); *South v. City of Mountain Brook*, 688 So. 2d 292, 296 (Ala. 1996)). “Thus, a lessee with exclusive possession of premises enjoys the same right as an owner to exclude trespassers.” *Id.* at 4. Accordingly, because ADPH, like a lessee, has exclusive possession of the premises, the ADPH may also develop reasonable and viewpoint neutral restrictions on public access to the state laboratory and prohibit photography and video recording by the public at county health departments.

There is nothing in your request that indicates that the land immediately surrounding the state laboratory possesses special characteristics that would entitle it to a higher level of scrutiny like that of a traditional public forum. Therefore, reasonable and viewpoint neutral restrictions placed on access to the interior of the state laboratory may be applied to the curtilage of the state laboratory as well. These restrictions should be tailored to prevent peering into windows and to securing against unlawful entry into secure areas.

Although this Office finds that restrictions on public access, photography, and recording may be implemented, whether the actual restrictions applied are reasonable and viewpoint neutral is a highly fact-specific question that cannot be determined by this Office. This Office makes determinations with respect to law and not fact. Ala. Code § 36-15-1(1)(a) & (b) (Westlaw 2020). Accordingly, the ADPH would be in a better position to make that determination.

In addition to reasonable and viewpoint neutral restrictions on visitors, ADPH may direct those who refuse to abide by the restrictions to leave the property. Failure to leave the property after being directed to

do so may constitute a trespass. Criminal trespass in the third degree prohibits a person (once specifically warned not to enter or remain) from knowingly entering or remaining unlawfully upon a premises. ALA. CODE § 13A-7-4(a) (Westlaw 2020). A “premises” includes a building or any real property. ALA. CODE § 13A-7-1(5) (Westlaw 2020).

By longstanding policy, this Office does not opine as to whether certain conduct constitutes a crime. Opinion to Honorable Arthur Green, District Attorney, dated August 9, 2005, A.G. No. 2005-173. Further, this Office has located no reported Alabama case wherein a “First Amendment auditor” has been prosecuted for trespass. The Supreme Court of Pennsylvania, however, addressed this issue in the case of *Commonwealth v. Bradley*, 232 A.3d 747 (Pa. 2020). There, a “first amendment auditor” attempted to video the interior of a police department waiting area. A law enforcement officer instructed the individual to cease recording and directed his attention to a no-filming sign conspicuously posted in the lobby. The individual refused to cease recording. Law enforcement arrested the individual and charged him with trespass. A jury convicted, and the Pennsylvania Supreme Court affirmed. *Id.* at 762. In affirming the trespass conviction, the *Bradley* opinion stressed that the filming prohibition was reasonable because it “prevent[ed] the disclosure of confidential information” and “preserv[ed] the privacy of victims.” *Id.* at 755.

Similar to the concerns of the police department in *Bradley*, ADPH has a duty to safeguard protected health information and to minimize incidental disclosure of such information. 45 C.F.R § 164.530(c)(2)(i-ii). This office is aware that “First Amendment auditors” routinely post their videos on the internet. Indeed, your request includes evidence that the instant “First Amendment auditor” did just that. Thus, allowing video recording of the lobby and secure areas of ADPH facilities could run afoul of ADPH’s HIPAA privacy mandate.

In follow-up dialogue with your office, concern was expressed that in the instant case, local law enforcement responded, but did not make an arrest. Although this Office has determined that a law enforcement officer may arrest for a trespass committed in their presence, he or she is not required to do so. See opinion to Tommy E. Tucker, dated August 11, 1988, A.G. No. 88-00414 (A police officer may arrest a person for criminal trespass without a warrant if the infraction is committed in his or her presence). In the absence of an arrest, an authorized representative of ADPH may seek the issuance of an arrest warrant from the local magistrate.

CONCLUSION

Reasonable and viewpoint neutral restrictions may be placed on the public's access to the Alabama Department of Public Health's state laboratory and county health departments.

I hope this opinion answers your questions. If this Office can be of further assistance, please contact Wes Shaw of my staff.

Sincerely,

STEVE MARSHALL
Attorney General
By:

A handwritten signature in black ink, appearing to read 'Ben Baxley', is written over the 'By:' line.

BEN BAXLEY
Chief, Opinions Division

SM/RWS/as
218535/2940288